Supreme Court, U. S.
FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

ARMAND DERFNER
NORMAN REDLICH
Trustees

ROBERT A. MURPHY
RICHARD T. SEYMOUR
WILLIAM E. CALDWELL
Staff Attorneys

Lawyers' Committee for
Civil Rights Under Law
733 - 15th St., N.W.
Suite 520
Washington, D.C. 20005

Attorneys for *Amicus Curiae*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
Table of Authorities	II
Interest of *Amicus Curiae*	1
Argument	4
1. Introduction	4
2. The Standard Petitioner Seeks Would Thwart the Purpose of Title VII	6
3. Congress Has Consistently Intended Party-"Neutral" Attorneys' Fees Authorizations To Be Implemented in Accordance With the Standards Adopted in the Judgment Below	11
Conclusion	19

TABLE OF AUTHORITIES

Cases: Page

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 5, 6, 10
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 2n, 11
Bolton v. *Murray Envelope Corp.*, 553 F.2d 881 (5th Cir. 1977) 6n
Bradley v. *School of Richmond*, 416 U.S. 696 (1974) 2n
Byram Concretanks, Inc. v. *Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967) 11n
Carrion v. *Yeshiva Univerity*, 535 F.2d 722 (2d Cir. 1976) 6n
Delaware Citizens for Clean Air, Inc. v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974) 14
EEOC v. *Bailey Co., Inc.* —— F.2d ——, No. 76-1045 (6th Cir. Sept. 20, 1977) 7n
EEOC v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974) 7n
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 2n
Grubbs v. *Butz*, 548 F.2d 973 (D.C. Cir. 1976) 6n
International Brotherhood of Teamsters v. *United States*, —— U.S. —— (1977) 8
Jaspers v. *Bernstein*, C.A. No. 76-1411 (D.D.C. Sept. 19, 1977) 9n
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 15n
Meeker v. *Lehigh Valley R.R.*, 236 U.S. 412 (1915) 12
Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 6, 7, 16
New York State Dept. of Social Services v. *Dublino*, 413 U.S. 405 (1973) 15n
Northcross v. *Board of Educ. of Memphis*, 412 U.S. 427 (1978) 6n, 15n
Parker v. *Califano*, —— F.2d ——, 14 EPD ¶ 7637 (D.C. Cir. June 30, 1977) 9, 15n
Robinson v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) 8n

TABLE OF AUTHORITIES—Continued

Page

Stanton v. *Bond*, 429 U.S. 973 (1976) 2n
United States v. *Allegheny-Ludlum Industries, Inc.*, 558 F.2d 742 (5th Cir. 1977) 7n
United States v. *Local Union No. 3, IUOE*, 6 EPD ¶ 8946 (N.D. Calif. Nov. 9, 1973) 9n
United States Steel Corp. v. *United States*, 519 F.2d 359 (3d Cir. 1975) 7n
Van Hoomissen v. *Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974) 7n
Wright v. *Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975) 6-7n

Statutes and Regulations:

15 U.S.C. § 15 ..... 18n
15 U.S.C. § 2073 12
15 U.S.C. §§ 2618-20 ..... 14n
29 U.S.C. § 206(d) 10n
29 U.S.C. § 216(b) 18n
31 U.S.C. § 1244(e) 14n
33 U.S.C. § 1365(d) 13
33 U.S.C. § 1415(g)(4) 13
42 U.S.C. § 1857h-2(d) 14n
42 U.S.C. § 1973*l*(e) 14n
42 U.S.C. § 1981 ..... 10n, 15n
42 U.S.C. § 1988 ..... 2n, 14, 15n
42 U.S.C. § 2000e-5(k) 4
42 U.S.C. § 2000e-5(*f*)(1) 9n
42 U.S.C. § 4911(d) 14n
49 U.S.C. § 16(2) 18n
Pub. L. No. 92-261, 86 Stat. 103 ..... 10n
Executive Order 11246, 30 Fed. Reg. 12319 (1965) 10n

Legislative Materials:

S. REP. No. 92-414, 92d Cong., 2d Sess. (1971) 13n
S. REP. No. 92-451, 92d Cong., 2d Sess. (1971) 13n
H.R. REP. No. 92-238, 92d Cong., 1st Sess. (1972) 10n

TABLE OF AUTHORITIES—Continued

	Page
LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (Senate Committee Print, 92d Cong., 2d Sess.)	10n
S. REP. No. 92-1160, 92d Cong., 2d Sess. (1972)	14n
S. REP. No. 94-251, 94th Cong., 2d Sess. (1975)	12n
S. REP. No. 94-295, 94th Cong., 1st Sess. (1975)	14n
S. REP. No. 94-1011, 94th Cong., 2d Sess. (1976)	16n
H.R. REP. No. 94-1558, 94th Cong., 2d Sess. (1976)	15n
122 CONG. REC. (daily ed. 1976)	14n, 16n

Other Materials:

ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS (1977)	8n
EEOC, 10TH ANNUAL REPORT (1976)	8n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1383

CHRISTIANSBURG GARMENT COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the Nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson,

* The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Rule 42(2).

Mississippi, and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The primary objective of the Lawyers' Committee is to help develop the legal resources necessary to enforce fully the civil rights of minorities and poor people. Pursuant to that objective, we seek to enlist the services of the private bar in aid of the individual rights secured by the Constitution and federal civil rights laws. That effort, in our extensive experience, is heavily dependent upon the availability of court-awarded attorneys' fees to plaintiffs who successfully carry on litigation to enforce congressional civil rights policies. Statutory authorization for such awards is a familiar legislative mechanism for encouraging private enforcement of congressional policies. The correct interpretation and implementation of such legislation is critical to a substantial part of the Committee's work. Consequently, for several years we have operated an Attorneys' Fees Project as an adjunct to our substantive litigation activities. Through that project we have provided assistance to Congress in connection with its consideration and passage of civil rights attorneys' fees legislation,[1] and we have participated in litigation involving the construction of such legislation.[2]

---

[1] For example, we presented testimony to Congress during its deliberations on, *inter alia*, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, amending 42 U.S.C. § 1988.

[2] In addition to numerous cases in the courts of appeals, we have filed *amicus* briefs with this Court in *Stanton* v. *Bond*, 429 U.S. 973 (1976); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974).

We thus offer our views on the question before the Court: what standards should guide federal district courts in the exercise of their discretion, under § 706 (k) of Title VII of the Civil Rights Act of 1964, to grant or deny applications for attorneys' fees by prevailing defendants in cases brought by the federal government (here the EEOC)? Beyond our general interest and experience with respect to that precise question, we are vitally concerned with the contention of petitioner and the *amici* which support it that the same standard which ordinarily entitles a prevailing private Title VII plaintiff to an award of attorneys' fees should apply with equal force to *all* prevailing Title VII *defendants*, irrespective of whether the suit is brought by the government or by private plaintiffs. Our alarm at this proposition stems from our intense involvement in employment discrimination litigation—through our privately-funded Government Employment Project (providing representation to federal, state and local government employees claiming unlawful employment discrimination), through our Equal Employment Project (which, pursuant to our contract with the EEOC, provides representation to private-sector plaintiffs), and through the general litigation activities of our Mississippi office and other local affiliates. As we will show in the Argument section, our experience is that the position advanced by petitioner, if adopted by the Court, would effectively foreclose a large amount of the most significant Title VII litigation, including that being pursued by the Lawyers' Committee, thereby seriously frustrating national policies of the highest order.

Respondent EEOC's brief is a persuasive and sufficient discussion of the issues in this case in terms of the structure, purpose and legislative history of Title VII. We accordingly submit this short brief only to address, from our perspective, two general aspects of the

controversy which may not be covered fully by respondent: to emphasize, on the basis of our extensive experience, that the allowance of fee awards to prevailing Title VII defendants as a matter of course in private-plaintiff suits would defeat the purposes of the Act; and to show, from our familiarity with attorneys' fees legislation, that the judgment below is wholly consistent with the entire range of congressional activity on the subject.

The Lawyers' Committee therefore files this brief as a friend of the court urging affirmance.

ARGUMENT

1. Introduction

This case requires the Court, for the first time, to establish in suits brought by the federal government, standards governing the exercise of discretion by federal district courts presented with requests by prevailing defendants for awards of counsel fees pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).[3] The position taken by petitioner and supported by *amici* is somewhat broader, however, in that it would have the Court decide the "prevailing defendant" question without regard to whether the suit was initiated by the federal government, as here, or by private litigants.[4] We are satisfied that respondent EEOC's brief,

[3] The statute reads as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[4] *Amicus* Equal Employment Advisory Council emphasizes factors of discretion which are peculiar to government-initiated litigation, but petitioner and *amicus* National Chamber Litigation Center suggest no such limitation on their broad contentions that the same guidelines which control "prevailing plaintiff" awards should control "prevailing defendant" awards.

with which we are in complete agreement, adequately deals with the precise question presented by the case (i.e., the standards governing fee awards to prevailing defendants when the government is the Title VII plaintiff) as well as the broader argument made by petitioner which would not distinguish between cases in which the government is the plaintiff and those in which a private party is the plaintiff. There are, nevertheless, some additional points we wish to make with respect to the broader argument. We also direct the Court's attention to Congress' consistent approach to the question of attorneys' fees in numerous statutory schemes.

Preliminarily, we respond to the argument that the plain language of § 706(k) makes resort to legislative history unnecessary (Pet. Br. at 4; NCLC Br. at 6), thereby mandating, in petitioner's words, that "the discretionary standard . . . is the same whether the prevailing party be plaintiff or defendant" (Pet. Br. at 11). This argument simply misses the point. We do not dispute that the same exercise of judicial power—the exercise of equitable "discretion"—is involved in making fee awards to prevailing defendants as is involved in making such awards to prevailing plaintiffs. But it hardly follows that "discretion" is synonomous with the blind application of a mechanical rule that takes no account of the purpose of the congressional scheme, that ignores the nature of the litigation, and that pretends that a defendant has the same characteristics as a plaintiff and that all plaintiffs are alike. Petitioner's argument thus overlooks settled doctrine: "when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes. . . ." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). The standards developed by the courts below for the exercise of discretion under § 706(k) "must

therefore be measured against the purposes which inform Title VII." *Id.*

Consistent with the principles later discussed in *Albemarle Paper*, the Court, in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), examined the national policies embodied in the Civil Rights Act of 1964 and adopted the following standard to govern the exercise of discretion by district courts under the Act when presented with fee claims from successful plaintiffs: such plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402.[5] The *Newman* approach certainly is applicable to this case, and faithful application of that approach will lead to a determination that ordinarily a prevailing Title VII *defendant* should *not* recover attorneys' fees. We show that a contrary result would (1) virtually nullify the private-enforcement scheme of Title VII, and (2) be at odds with Congress' uniform approach to attorneys' fees legislation.

2. The Standard Petitioner Seeks Would Thwart the Purpose of Title VII

At the time of the grant of certiorari in this case the courts of appeals which had addressed the question were unanimous in their conclusion that prevailing Title VII defendants should not, as a matter of course, recover attorneys' fees from losing plaintiffs.[6] These courts reasoned that the fundamental purposes of Title VII required that different considerations be taken into account in the exercise of § 706(k) discretion in "prevailing defendant" cases, and that such a defendant should recover attorneys' fees from a losing plaintiff only when the plaintiff's litigation conduct amounted to what we generically describe as "bad faith." The reasons for this different standard are obvious. These courts are unwilling to assume that Congress, having provided for attorneys' fees as a means of enabling aggrieved parties to bring enforcement suits, *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 401-02; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415, simultaneously intended to deter those aggrieved parties by making them face the prospect of paying their opponents' fees if the suit, though brought in good faith, is unsuccessful. Such a rule would deter not only the frivolous but the meritorious suits as well.

To attribute to Congress the self-defeating motive inherent in petitioner's argument would practically termin-

---

[5] Although *Newman* involved Title II's fee provision, § 204(b), 42 U.S.C. § 2000a-3(b), the language of that section is virtually identical to § 706(k) and the *Newman* rationale is equally applicable to Title VII. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415; *see also Northcross* v. *Board of Education of Memphis*, 412 U.S. 427 (1973).

[6] In addition to the decision below (550 F.2d 949), *see Bolton* v. *Murray Envelope Corp.*, 553 F.2d 881, 884 n.2 (5th Cir. 1977); *Grubbs* v. *Butz*, 548 F.2d 973, 975 (D.C. Cir. 1976); *Carrion* v. *Yeshiva University*, 535 F.2d 722 (2d Cir. 1976); *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1063-64 (8th Cir. 1975); *United States Steel Corp.* v. *United States*, 519 F.2d 359 (3d Cir. 1975); *Van Hoomissen* v. *Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974) (unpublished order of Nov. 6, 1974); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1096 (6th Cir. 1974). Since the Court's grant of certiorari here, however, two courts of appeals' decisions have held that prevailing defendants should recover fees under the same standard as prevailing plaintiffs—i.e., ordinarily. *EEOC* v. *Bailey Co., Inc.*, —— F.2d ——, No. 76-1045 (6th Cir. Sept. 20, 1977); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 558 F.2d 742 (5th Cir. 1977). Both of these decisions rely on the flawed "plain language" argument advanced by petitioner and its friends (*see* p. 5, *supra*). In addition, the court in *EEOC* v. *Bailey Co., Inc.*, like the petitioner here (*see* Pet. Br. at 9), argues that "[i]f the objective of Congress [in § 706(k)] had been to authorize the assessments [*sic*] of attorneys' fees against a private plaintiff who acts in bad faith, then no new statutory provision would have been necessary because the American rule allows recovery in such cases even without a statute." Slip Op. at 32 n.10. This argument, too, is erroneous. *See* note 12, *infra*.

ate private enforcement of Title VII, thereby eliminating the major force in the implementation of the law and its purposes.[7] One needs only to glance at the Title VII decisions handed down during recent Terms of this Court to know that Title VII litigation is both factually and legally complex. Even when the legal principles are relatively well-settled, their proper application frequently will turn on factual details that cannot be known prior to the commencement of suit and extensive discovery. On the other hand, even when the facts are comparatively clear-cut at the pre-complaint stage, numerous questions of law arise about which there are reasonable differences of opinion—questions, both substantive and procedural, which divide this Court as well as the lower courts, and which sometimes go for years without authoritative resolution. *See, e.g., International Brotherhood of Teamsters* v. *United States*, —— U.S. —— (1977). The great majority of these difficult factual and legal questions have been presented and resolved in the context of groundbreaking private litigation.[8] Such litigation is essential

[7] As evidenced by Congress' grant of litigation authority to the EEOC in 1972, as well as by the EEOC's enormous backlog of complaints, the congressional hope of 1964—that equal employment opportunities would be attained through the administrative process—has not borne fruit. Hence, litigation is the primary hope for fulfillment of Title VII's promises. That hope, in turn, rests to a very large extent on suits initiated by private plaintiffs, as a brief review of the latest advance sheets will quickly demonstrate. In fiscal year 1976, 5,321 Title VII actions were filed. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS 204 (1977). The latest information available from the EEOC, that for fiscal year 1975, shows that the agency filed only 180 Title VII cases and intervened in only 36 others. EEOC, 10TH ANNUAL REPORT at 10 (1976).

[8] Consider, for example, Judge Sobeloff's oft-cited opinion in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). That case was initiated by private plaintiffs (who were ultimately successful) despite an EEOC administrative determination "that there was no reasonable cause to believe that the Act [Title VII] had been violated." 444 F.2d at 800. It is not irrational to hypothesize that *Robinson*, and numerous similar cases, would never have been filed if the plaintiffs had been informed of a real possibility that the end of the long litigation road, though travelled in good faith, would be an award requiring payment of the defendant's substantial litigation expenses and attorneys' fees.

to the public policies embodied in Title VII: "there is an interest in having novel theories expounded and prior holdings extended, all of which increases the possibility that plaintiffs in a particular case may not prevail and that their counsel may not be paid."[9] We cannot overemphasize our conviction, confirmed by our experience in representing the victims of employment discrimination, that such important litigation will not be brought if this Court holds that a prevailing Title VII defendant should ordinarily recover attorneys' fees from an unsuccessful plaintiff. Faced with that prospect, most of our present and former clients (who generally are economically disadvantaged), in our judgment, would have elected not to seek judicial relief and run the very real risks of further economic injury in the form of an award of fees to the prevailing defendant. The prospect of such an award, morever, would even chill the willingness to sue of a plaintiff with an apparently strong case. *Cf. Parker* v. *Califano*, —— F.2d ——, 14 EPD ¶ 7637 at p. 5134 (D.C. Cir. June 30, 1977).[10]

The obvious practical impact of the proposition asserted by petitioner, therefore, is so patently at variance with

[9] *United States* v. *Local Union No. 3, IUOE*, 6 EPD ¶ 8946, at p. 6034 (N.D. Calif. Nov. 9, 1973).

[10] Even the prospect of having to pay an opponent's court costs can have a chilling effect on the pursuit of judicial relief, *Jaspers* v. *Bernstein*, C.A. No. 76-1411 (D.D.C. Sept. 19, 1977). Congress was obviously concerned with the potential for such adverse effects on the employment rights of impecunious Title VII plaintiffs: in addition to the attorneys' fees authorization of § 706(k), the Act, by § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), also authorizes the district courts to appoint attorneys for plaintiffs and to allow them to proceed in *forma pauperis*.

"'the large objectives of the Act,'" *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 416, that it cannot survive "measure[ment] against the purposes which inform Title VII." *Id.* at 417. In the absence of some unequivocal statement to the contrary from Congress, and clearly there is none,[11] the Court ought not to dismantle Title VII

[11] The *amicus* brief of the National Chamber Litigation Center argues that, in the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, the House of Representatives rejected "a bill which would have amended § 706(k) to allow only 'prevailing plaintiffs' to be granted attorneys' fees." NCLC Br. at 11. This description does not accurately reflect the action of the House. While H.R. 1746 as reported by the Committee did include the change described, its major thrust was to provide for administrative enforcement of the Act by means of a cease-and-desist procedure in the EEOC. H.R. REP. No. 92-238, 92d Cong., 1st Sess. (1972). *See* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 61-131 (Senate Committee Print, 92d Cong., 2d Sess.) [hereinafter, "LEGISLATIVE HISTORY"]. The Committee report simply stated the fact of the changed language, but did not indicate any view that the difference in language would cause any differences in the law, or would do anything but make explicit what Congress had intended implicitly in 1964. The minority report objected to the change on the ground that it would be "contrary to the rule in most jurisdictions; and may constitute an incentive for harassment suits and a 'disincentive' to respondents not to resist ill-founded claims." LEGISLATIVE HISTORY, *supra*, at 91-92 and 125.

Representatives Erlenborn and Mazzoli offered a substitute, H.R. 6760, which relied exclusively on court enforcement and would have allowed the EEOC to bring suit, which barred relief for any class members who had not themselves filed charges of discrimination or been named in charges filed by other persons, and which made Title VII the exclusive remedy for claims of discrimination in employment. LEGISLATIVE HISTORY, *supra*, at 132-47. Virtually all of the debate in the House involved the wisdom of a cease-and-desist procedure as opposed to court enforcement, the wisdom of abolishing remedies under Executive Order 11246, 30 Fed. Reg. 12319 (1965), which requires nondiscrimination by government contractors, the legitimacy of the imposition of "goals and timetables" or of "quotas" under the Executive Order, the wisdom of abolishing the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), as remedies for employment discrimination, and the wisdom of the practical abolition of class actions in Title VII cases. LEGISLATIVE HISTORY, *supra*, at

in the manner contemplated by petitioner's argument. [illegible] now show that petitioner's burden is made [illegible] difficult by Congress' consistent approach to [illegible] fees legislation.

3. Congress Has Consistently Intended Party-"Neutral" Attorneys' Fees Authorizations To Be Implemented in Accordance With the Standards Adopted in the Judgment Below

The traditional American common-law rule, with certain distinct and narrow equitable exceptions, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975),[12] has each party to a lawsuit bear his own at-

189-324. The House ultimately adopted the Erlenborn substitute, *id.* at 314, but without one word having been said in the debate about the "prevailing plaintiff" language in the original H.R. 1746. Indeed, the only reference in the debate to fee awards is a statement by Representative O'Hara that an aggrieved party "is now guaranteed attorneys' fees and costs if he wins." *Id.* at 264.

The legislative history thus indicates that the House never adverted to the proposed change in § 706(k) when deliberating H.R. 1746 and the Erlenborn substitute, and that its action in adopting the substitute was entirely independent of this proposed change. In view of the fact that during these same sessions Congress was addressing the question of attorneys' fees to prevailing defendants in connection with other legislative schemes and indicating its view that such defendants should not ordinarily recover fees (*see* notes 15-19, *infra*, and accompanying text), the inference is strong that Congress did not desire a different standard in Title VII cases.

[12] The petitioner and at least one lower court (*see* note 6, *supra*) argue that the "bad faith" standard adopted by the courts in the instant case renders the "prevailing party" language of § 706(k) superfluous since courts have inherent power—the "bad faith" exception to the American rule—to award fees in cases of "bad faith" litigation. This argument ignores the fact that when Congress does pass one-way legislation authorizing fees to plaintiffs only, it is generally deemed to have eliminated the courts' equitable discretion to award fees on any non-statutory ground in a case arising under such a statute. *See Byram Concretanks, Inc.* v. *Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967). Hence, the "prevailing party" langauge in Title VII was necessary in order to preserve courts' power to award fees to defendants who are faced with "bad faith" litigation by plaintiffs.

torneys' fees, whatever the outcome. This contrasts with the practice in most other countries, where those who prevail in any type of case ordinarily recover their counsel fees. Congressional statutes which have authorized court-awarded attorneys' fees have never been meant to change the American rule, but simply to provide plaintiffs with an additional remedy as an adjunct to statutes declaring significant national policy. *See Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 412 (1915). This has been true not only in statutes which by their terms authorize fees only to plaintiffs but also in statutes which are nominally "neutral," as with Title VII. Congress has, especially in recent years, frequently authorized fees to the "prevailing party," "any party," or the like, and has given those terms a settled meaning by explaining them in the reports and floor debates of at least nine statutes. That settled meaning involves discretionary standards for awarding fees to prevailing plaintiffs (whom Congress desires to recover fees as a matter of course, absent exceptional countervailing circumstances) that meaningfully differ from the standards controlling awards to successful defendants (who, in the absence of unreasonable litigation conduct on the part of the plaintiffs, should ordinarily not recover attorneys' fees). Congress has repeatedly emphasized this theme.

Thus, as Congress said in its Conference Report on the Consumer Product Safety Commission Improvements Act, 15 U.S.C. § 2073,[13] in explaining why fees are to be liberally awarded to plaintiffs but not to defendants:[14]

> The standard for awarding costs to a prevailing defendant is not the same as for a plaintiff because, if it were, the risk of bringing suit under these sections could be so great as to frustrate the purposes

[13] § 2073 authorizes the district courts to award fees "[i]n any action . . . in the interest of justice. . . ."

[14] S. REP. No. 94-251, 94th Cong., 2d Sess. 23 (1975).

> of the sections. However, in exceptional circumstances, costs might be awarded to defendants where they must "defend against unreasonable, frivolous, meritless, or vexatious actions * * *", *United States Steel Corp.* v. *United States*, 385 F. Supp. 346, 348 (W.D. Pa. 1974). Where plaintiff's proceeding is brought in good faith or on the advice of competent counsel, costs would ordinarily be denied to a prevailing defendant. *Richardson* v. *Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd 468 F.2d 951 (5th Cir. 1972).

In enacting the attorneys' fees provision of the Marine Protection Act, 33 U.S.C. § 1415(g)(4), which provides for fees to "any party, whenever the court determines such award is appropriate," Congress said:[15]

> Furthermore, in issuing a final order in any such suit the court may award certain costs of litigation to any party when it concludes, in its discretion, that such an award is appropriate (e.g., if the plaintiff shows that the suit was meritorious, and not filed for the sake of mere harassment). On the other hand, if the court concludes that the purpose of the suit was harassment, the court may award such costs to the defendant.

And in the Water Pollution Control Act Amendments, containing similar language, 33 U.S.C. § 1365(d), it was explained that:[16]

> Concern was expressed that some lawyers would use section 505 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This

[15] S. REP. No. 92-451, 92d Cong., 2d Sess. (1971).

[16] S. REP. No. 92-414, 92d Cong., 2d Sess. 81 (1971).

> should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.
>
> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party.

To the same effect are: the Clean Air Act ("any party"),[17] discussed in *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974); the Noise Pollution Control Act ("any party"),[18] patterned after the Clean Air Act[19]; the Voting Rights Act Extension of 1975 ("prevailing party")[20]; the Toxic Substances Control Act ("in any action")[21]; the Revenue Sharing Amendments ("prevailing party").[22]

Congress has recently and forcefully reaffirmed this approach. In the first statute ever passed dealing solely with attorneys' fees, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, amending 42 U.S.C. § 1988, which uses the same "prevailing party" language as § 706(k), Congress has presented the most detailed legislative history to date on the purposes underlying attorneys' fees authorizations in remedial statutory schemes. This history is replete with explanations of the limited

---

[17] 42 U.S.C. § 1857h-2(d).

[18] 42 U.S.C. § 4911(d).

[19] *See* S. REP. No. 92-1160, 92d Cong., 2d Sess. 8 (1972).

[20] 42 U.S.C. § 1973*l*(e). *See* S. REP. No. 94-295, 94th Cong., 1st Sess. 40-41 (1975).

[21] 15 U.S.C. §§ 2618-20. *See* 122 CONG. REC. S4416-17 (dailey ed. March 26, 1976) (remarks of Senator Tunney).

[22] 31 U.S.C. § 1244(e). *See* 122 CONG. REC. S15725 (dailey ed. Sept. 13, 1976) (remarks of Senator Brooke).

availability of fee awards to prevailing defendants.[23] The Report of the House Judiciary Committee explains why the "prevailing party" language was used:[24]

> when the Justice Department testified in support of H.R. 9552, the predecessor to H.R. 15460, it suggested an amendment to allow recovery only to prevailing plaintiffs. Assistant Attorney General Lee thought the phrase "prevailing party" might have a "chilling effect" on civil rights plaintiffs, discouraging them from initiating law suits. The Committee was very concerned with the potential impact such a phrase might have on persons seeking to vindicate these important rights under Federal law. In light of existing case law under similar provisions, however, the Committee concluded that the application of current standards to this bill will significantly reduce the potentially adverse affect on the victims of unlawful conduct who seek to assert their federal claims.

---

[23] While not dispositive, the legislative history of the 1976 Act and the other statutes discussed above certainly is relevant to the ascertainment of congressional intent with respect to the earlier-passed Title VII fee provision. *See generally Parker* v. *Califano*, *supra*, 14 EPD ¶ 7637 at pp. 5137 & 5141 n.11, and authorities there discussed; *cf. New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 416 n.19 (1973). Moreover, as this Court has noted in the specific context of civil rights attorneys' fees legislation, "[t]he similarity of langauge . . . [between two fee provisions passed at different times] is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross* v. *Board of Educ. of Memphis*, 412 U.S. 427, 428 (1973). Finally, a holding in this case inconsistent with the clear legislative intent in the 1976 Act would have bizarre consequences. For example, how would a district court decide a prevailing defendant's motion for fees in a private-plaintiff employment discrimination case brought pursuant to both Title VII and 42 U.S.C. § 1981 (*see Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975)), if the Title VII standard were different from the one applicable to § 1981 by virtue of the 1976 amendment to 42 U.S.C. § 1988?

[24] H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 6 (1976).

Following a discussion of the standard used to award fees to prevailing *plaintiffs*, citing *Newman* v. *Piggie Park Enterprises, Inc., supra*, the report goes on: [35]

> the courts have developed a different standard for awarding fees to prevailing defendants because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circumstances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States, supra* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975); see also *Richardson* v. *Hotel Corp of America*, 332 F. Supp. 519 (E.D.La. 1971), *aff'd without published opinion*, 468 F.24 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.

The Senate Judiciary Committee Report is also unequivocal and persuasive: [36]

[35] *Id.* at 7.

[36] S. REP. No. 94-1011, 94th Cong., 2d Sess. 4-5 (1976) (footnote omitted). *See also* 122 CONG. REC. S16280 (remarks of Sen. Bumpers) (daily ed. Sept. 21, 1976); *id.* at S16431 (exchange between Sens. Abourezk and Hathaway) (daily ed. Sept. 22, 1976); *id.* at S16491 (Sen. Tunney) (daily ed. Sept. 23, 1976); *id.* at S17050-51 (Sens. Tunney and Kennedy) (daily ed. Sept. 29, 1976); *id.* at H12156 (Rep. Bauman), H12159-60 (Rep. Drinan), H12162 (Rep. Kastenmeier), H12165-66 (Rep. Seiberling) (daily ed. Oct. 1, 1976).

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. *Richardson* v. *Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. *United States Steel Corp.* v. *United States*, 385 F. Supp. 346 (W.D. Pa. 1974), aff'd, 9 E.P.D. ¶ 10,225 (3d Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. Similar standards have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act, 1972 U.S. Code Cong. & Adm. News, 3747; the Marine Protection Act, Id. at 4249-50; and the Clean Air

Act, Senate Report No. 91-1196, 91st Cong., 2d Sess., p. 483 (1970). See also *Hutchinson* v. *William Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943) (Fair Labor Standards Act).

In short, while the standards by which fees are awarded to plaintiffs have varied, Congress appears to have followed a uniform rule for defendants: awards of fees are available only in exceptional circumstances, if at all.[37] Against this background, it is not plausible to suppose that when Congress passed the monumental Civil Rights Act of 1964, it intended—silently—to discard the American rule and give defendants in employment discrimination cases an unprecedented weapon which would defeat the legislative will so laboriously debated and enacted.

---

[37] In addition to these numerous statutes under which fees are available to defendants only in rare cases, Congress has also passed many statutes under which fees are not available to defendants under any circumstances. *See, e.g.*, Clayton Act, 15 U.S.C. § 15; Interstate Commerce Commission Act, 49 U.S.C. § 16(2); Fair Labor Standards Act, 29 U.S.C. § 216(b).

CONCLUSION

The judgment below should be affirmed.

October 1, 1977.

Respectfully submitted,

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

ARMAND DERFNER
NORMAN REDLICH
Trustees

ROBERT A. MURPHY
RICHARD T. SEYMOUR
WILLIAM E. CALDWELL
Staff Attorneys

Lawyers' Committee for
Civil Rights Under Law
733 - 15th St., N.W.
Suite 520
Washington, D.C. 20005

Attorneys for *Amicus Curiae*